Calendar No. 509

108TH CONGRESS, *2d Session* | SENATE | REPORT 108–261

CHEMICAL FACILITIES SECURITY ACT OF 2003

MAY 11, 2004.—Ordered to be printed

Mr. INHOFE, from the Committee on Environment and Public Works, submitted the following

REPORT

[to accompany S. 994]

[Including cost estimate of the Congressional Budget Office]

TOGETHER WITH

ADDITIONAL VIEWS

The Committee on Environment and Public Works, to which was referred a bill (S. 994) to protect human health and the environment from the release of hazardous substances by the acts of terrorism, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

GENERAL STATEMENT AND BACKGROUND

Chemical industries are crucial components of the national economy and the infrastructure of the United States. A terrorist attack on a chemical facility could pose a serious threat to lives and the economy. According to a recent report by the United States General Accounting Office, "experts agree that chemical facilities present an attractive target for terrorists intent on causing massive damage."[1] Since its creation, DHS has developed and begun implementing a comprehensive strategy for the protection of the Nation's infrastructure, including chemical, against a terrorist attack. This strat-

[1] GAO–04–482T, Homeland Security: Federal Action Needed to Address Security Challenges at Chemical Facilities (February 23, 2004), p.6.

egy focuses on identification of threats, vulnerabilities and the means to deter and prevent such attacks. DHS has been working closely with other Federal agencies, State, and local authorities (including first responders) to develop and implement these measures.

Congress has long been concerned about releases of hazardous chemicals from industrial facilities and has enacted several statutes to help prevent such releases and to improve preparedness and response capabilities. For example, the Emergency Planning and Community Right-to-Know Act (EPCRA), passed in 1986, contains four major requirements designed to help facilities and communities understand, prepare for, and respond to accidental releases of hazardous chemicals.[2] The four requirements are emergency planning, release notification, hazardous chemical storage reporting, and toxics release reporting. The emergency planning provisions of EPCRA established State Emergency Response Commissions (SERCs) and Local Emergency Planning Commissions (LEPCs). LEPCs are composed of emergency responders and other local officials, and are required to develop emergency response plans and communicate these plans to the public. The EPCRA notification and storage reporting requirements establish thresholds and reporting requirements for releases and storage of certain extremely hazardous substances held onsite.

Additionally, the Clean Air Act Amendments of 1990 required the Occupational Safety and Health Administration to promulgate Process Safety Management (PSM) regulations that apply to chemical facilities.[3] The PSM regulations increase worker safety by preventing or minimizing the consequences of releases of toxic, reactive, flammable, or explosive chemicals. The 1990 Clean Air Act Amendments also required EPA to establish the Chemical Accident Prevention program under section 112(r) that is designed to prevent accidental releases of chemicals and mitigate the consequences of releases that may occur. The requirements of this subsection apply to stationary facilities at which is present more than a threshold amount of certain chemicals. Approximately 15,000 facilities are subject to the requirements. These facilities must develop risk management programs that include a hazard assessment of the offsite consequences of releases under a worst-case scenario and a more realistic, alternate-case scenario, a prevention program, and an emergency response program. Information about these programs must be documented in a Risk Management Plan (RMP) that is submitted to EPA and made available to States and local planning agencies, as well as to the public according to procedures set forth in 40 CFR 68.

While programs to protect the health and safety of workers, the public, and the environment by reducing the potential for accidental releases of potentially dangerous chemicals, including the consequences of worst-case releases of those chemicals, are in place as required by numerous Federal and State laws, the events of September 11, 2001 demonstrate the need to ensure that appropriate security measures are taken to address the threat of acts of terrorism against facilities that manufacture, use, or process poten-

[2] Public Law 99–499, 42 U.S.C. 11011–11050.
[3] Public Law 101–549, 29 U.S.C. 655. The PSM rules are 29 CFR 1910.119.

tially dangerous chemicals. In the period after those attacks, the President's draft National Strategy for Homeland Security identified 13 sectors as critical to the Nation's infrastructure.[4] The chemical industry sector was one of those sectors. The Administration's final document, *The National Strategy for the Physical Protection of Critical Infrastructures and Key Assets*, identified the objectives and guiding principles for securing the infrastructure and assets of the 13 sectors.[5] With regard to the chemical industry, the report, which was issued before the creation of the Department of Homeland Security, noted that "there is currently no clear, unambiguous legal or regulatory authority at the Federal level to help ensure comprehensive, uniform security standards for chemical facilities."[6] Since the creation of DHS, the department has undertaken a far-reaching effort to address the chemical security concerns addressed in the report.

The report also discussed risk reduction issues, concluding that "the risk profiles of chemical plants differ tremendously because of differences in technologies, product mix, design, and processes. Therefore, no single, specific security regime would be appropriate or effective for all chemical facilities."[7] As a result, the report stated that the soon-to-be-created DHS will work with Congress to enact flexible legislation that would "require certain chemical facilities, particularly those that maintain large quantities of hazardous chemicals in close proximity to population centers, to undertake vulnerability assessments and take reasonable steps to reduce the vulnerabilities identified."[8] Consistent with that standard, DHS and the Administration have voiced support for the Inhofe bill, S. 994, as introduced.

Since September 11, there have been a variety of voluntary industry initiatives with the intent of improving security at chemical facilities. The American Chemistry Council (ACC), for example, has adopted a security code as part of its Responsible Care® program and requires adherence to that code as a condition of membership. As another example, the agriculture community has developed a new Security Vulnerability Assessment (SVA) for farm supply stores, farm cooperatives, and other local dealers of farm products to help safeguard crop inputs commonly used on farms.

Additionally, the last Congress enacted two statutes that address the security of some chemical sector facilities. In the first half of 2002, it passed the Public Health Security and Bioterrorism Preparedness Act, Title IV of which requires larger community drinking water supply systems to conduct vulnerability assessments and prepare emergency response plans.[9] The Maritime Transportation Security Act, passed at the end of the 107th Congress, imposes highly detailed requirements for assessments and plans at facilities adjacent to waters subject to U.S. jurisdiction that might be involved in a transportation security incident.[10]

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[4] Draft National Strategy for Homeland Security (July 2002).
[5] The National Strategy for the Physical Protection of Critical Infrastructures and Key Assets (February 2003).
[6] Id. at 66.
[7] Id. at 66.
[8] Id. at 66.
[9] Public Law 107–188, 42 U.S.C. 300i-2.
[10] Public Law 107–295, 46 U.S.C. § 70101–70117.

Not every chemical facility, however, is covered by these statutes or is a member of a trade association or other organization with an established and effective security program. "Although the chemical industry has undertaken a number of initiatives to address security concerns, the extent of security preparedness across the chemical industry is unknown."[11] Accordingly, a properly tailored Federal chemical security program would provide accountability across the sector, while also recognizing significant past and current activity undertaken voluntarily to enhance security and risk reduction measures.

In March 2003, Sens. Inhofe and Miller introduced S. 994, the Chemical Security Act of 2003. This bill seeks to ensure that appropriate security measures are taken to address the threat of acts of terrorism against our Nation's chemical infrastructure.

OBJECTIVES OF THE LEGISLATION

S. 994 is intended to ensure that the threat of terrorist attack on chemical facilities is addressed quickly, consistently and effectively across the spectrum of U.S. industrial facilities that have hazardous chemicals. The Department of Homeland Security (DHS) is charged with implementing the Act.

The Act requires the Secretary to develop a list of chemical sources within 180 days of enactment. A chemical source is a non-Federal stationary source for which the owner or operator is required to submit to EPA risk management plans (RMPs) under the accidental release prevention programs established under section 112(r) of the Clean Air Act. Within 1 year of enactment, the Secretary must promulgate regulations covering listed chemical sources. That rulemaking would include requirements for each facility to conduct a vulnerability assessment and prepare a site security plan that addresses the vulnerabilities found in the assessment by improving security. Site security plans shall also include consideration and, where practicable in the judgment of the owner, implementation of options to reduce the threat or consequences of a terrorist release. Copies of the assessments and security plans must be submitted to the Secretary no later than 18 months after the date of promulgation of regulations. The Secretary is required to review the documents to determine whether the vulnerability assessments were conducted in compliance with the regulations and whether the security plans were prepared and are being implemented in compliance with the regulations.

The Act would promote innovation and provide appropriate flexibility in compliance mechanisms. The Act creates an alternative compliance mechanism under which the Secretary can recognize those procedures, protocols, regulations, and standards that the Secretary has determined are substantially equivalent to the portions of the Act requiring regulations for vulnerability assessments and site security plans and the contents of the site security plans. This will allow the Department to focus its resources on the highest priority facilities. Additionally, the committee wanted to ensure voluntary efforts currently underway were not derailed or curtailed

[11] GAO–04–482T, Homeland Security: Federal Action Needed to Address Security Challenges at Chemical Facilities (February 23, 2004), p. 4.

in anticipation of regulations from DHS. The Act contains significant penalties for violations and provides the Secretary with order authority to address emergency threats.

SECTION-BY-SECTION ANALYSIS

Section 1. Short Title

Sets forth the short title of the bill as "The Chemical Facilities Security Act of 2003."

Sec. 2. Definitions

Section 2 defines 12 terms for the purposes of the Act. Definitions include:

"Alternative Approaches" means ways of reducing the threat of a terrorist release (making targets less attractive) or the consequences of a terrorist release from a chemical source. The definition contains a non-exhaustive list of three examples of such approaches: using smaller quantities of substances of concern, replacing a substance of concern with a less hazardous substance, or using less hazardous processes.

"Chemical Source" is a non-Federal stationary source required to submit risk management plans (RMPs) to EPA (as defined in section 112(r) of the Clean Air Act), and for which the Secretary of the Department of Homeland Security is required to promulgate implementing regulations.

"Consideration" means that a facility security plan must include an analysis of alternative approaches and their benefits, risks and costs; as well as their potential to prevent or reduce terrorist releases; and their affect on products and employee safety.

"Department" means the Department of Homeland Security.

"Environment" has the meaning given in section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).

"Owner or Operator" has the meaning given in section 112(a) of the Clean Air Act.

"Release" is as defined in section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).

"Secretary" is the Secretary of the Department of Homeland Security.

"Security Measure" means an action to ensure or enhance the security of a chemical source, and includes measures such as employee training and background checks, limiting or preventing access to controls of the source, perimeter protection, installing and operating intrusion detection sensors, increasing computer or computer network security; implementing other security-related measures to protect against or reduce the threat of a terrorist attack or theft of a substance of concern for offsite release; installing measures and controls to protect against or reduce consequences of a terrorist attack; and conducting any similar security-related activity as determined by the Secretary.

"Substance of Concern" is any regulated substance under paragraphs (3) and (5) of section 112(r) of the Clean Air Act, and any substance added by the Secretary through rulemaking.

"Terrorism" has the meaning given in section 2 of the Homeland Security Act of 2002.

"Terrorist release" means a release into the environment from a chemical source a substance of concern caused by an act of terrorism, and the theft of a substance of concern by a person for off-site release in furtherance of an act of terrorism.

Sec. 3. Vulnerability Assessments and Site Security Plans

SUMMARY

Section 3 establishes the requirements for conducting vulnerability assessments and site security plans, including regulatory criteria; and provides for the recognition of substantively equivalent procedures and the protection of data and information collected in development and implementation of assessments and plans.

Subsection 3(a)—Requirement

Subsection 3(a)(1)—Requires the Secretary, not later than 1 year after enactment, to issue regulations requiring the owner or operator of a covered chemical source to conduct a vulnerability assessment and to prepare and implement a site security plan to address vulnerabilities.

Subsection 3(a)(2)—Specifies the contents of a site security plan and establishes the standards that a site security plan must meet. Requires the site security plan (or other plan deemed substantially equivalent) to significantly reduce the vulnerability of the source to a terrorist release, including particular equipment, plans and procedures that could be used, as well as any alternative approaches.

DISCUSSION

The committee believes that it is important to require owners and operators to consider the ability of alternative technologies to reduce the threat of a terrorist attack by making the source a less attractive target or by limiting the consequences of a successful attack. However, the committee also believes that judgments about alternative approaches are fundamentally process safety decisions that must be left to the process safety professionals who best understand their processes and facilities.

Subsection 3(a)(3)—Specifically stipulates that within 1 year of enactment the Secretary shall promulgate regulations establishing procedures, protocols, regulations, and standards for vulnerability assessments and site security plans.

Subsection 3(a)(4)—Requires the Secretary, within 1 year of enactment, to publish guidance to assist small entities in complying with the alternative approaches requirements of section 3(a)(2).

Subsection 3(a)(5)—Requires the Secretary to provide owners and operators of covered chemical sources, to the extent practicable, with threat information that is relevant to that chemical source.

Subsection 3(a)(6)—Allows for the coordinated development and implementation of vulnerability assessments and site security plans when more than 1 chemical source is operating at a single or contiguous location.

Subsection 3(b)—Certification and Submission

Subsection 3(b)(1)—Requires the owner or operator of a covered chemical source to certify to the Secretary compliance with those rules and any applicable procedure, protocol, regulation or standard endorsed or recognized by the Secretary.

Subsection 3(b)(2)—Requires the owner or operator of a covered chemical source to submit copies of its vulnerability assessment and site security plan within 18 months of the date of promulgation of regulations for DHS review.

Subsection 3(b)(3)—Authorizes the Secretary to ensure compliance with this Act, the rules under it and any applicable procedure, protocol, regulation or standard endorsed or recognized by the Secretary. This can include requiring sources to conduct third-party audits of compliance.

DISCUSSION

The committee believes that the most effective and efficient way for the Secretary to assure the security of chemical sources, as well as their compliance with this Act, is by conducting inspections, coordinating with relevant State and local authorities, and similar field activities that address the highest priority sites. This will allow the Secretary and security experts within the department to focus their resources on those facilities they deem to be the highest priority.

Subsection 3(b)(4)—Requires the owner or operator of a chemical source to provide notification of any changes or updates to the vulnerability assessments or site security plans within 90 days of the change and to update its certification.

Subsection 3(c)—Specified Standards

Subsection 3(c)(1)—Authorizes the Secretary to endorse or recognize existing procedures, protocols, regulations, or standards established by industry, State or local authorities or other law, that are substantially equivalent to the requirements of the Act.

DISCUSSION

The committee recognizes that several business sectors have already committed considerable resources to developing security initiatives tailored to their specific sector. Many facilities have already implemented these initiatives and many more will likely have been completed by the time the Secretary issues the regulations pursuant to this Act. Accordingly, this subsection provides an "alternative compliance" mechanism whereby an association or an individual facility may seek the Secretary's determination that the initiative is substantially equivalent to the requirements of this Act. By allowing this mechanism, the committee wanted to ensure that no disincentives to continue these voluntary initiatives were inadvertently created.

Similarly, other Federal, State, and local entities may establish facility security requirements that are equivalent to those established by this Act.

Subsection 3(c)(2)—Requires the Secretary to provide the petitioner with notice of a finding that such procedures, regulations or

standards are substantially equivalent to the regulations promulgated.

Subsection 3(c)(3)—Requires the Secretary to provide the petitioner with notice that such procedures, protocols, regulations, or standards are not recognized or endorsed. The Secretary must provide the petitioner a clear, written explanation as to why the endorsement of recognition was not made.

Subsection 3(d)—Preparation of Assessments and Plans—Clarifies that endorsement or recognition under subsection (c) has effect not only prospectively after the Act is enacted but retroactively, as well. Also clarifies that upon such action, the requirements of the approved procedures, protocols, regulations, or standards, rather than the regulations required by the Act, become obligations—legally enforceable by the Secretary—of any facility that opts to proceed on that basis.

Subsection 3(e)—Regulatory Criteria—Establishes regulatory criteria for regulations promulgated pursuant to the Act and endorsed/recognized procedures, protocols or standards. In evaluating both, the Secretary must consider the likelihood that a chemical source will be a target; the nature and quantity of substances of concern present; and the potential for harm or adverse effect to human health and the environment, critical infrastructures, and national security. Cost, technical feasibility and scale of operations must also be considered, as well as any other security-related factors that the Secretary determines to be appropriate.

Subsection 3(f)—List of Chemical Sources—Not later than 180 days after the date of enactment, the Secretary must develop a list of chemical sources in existence as of that date using the criteria in subsection (e). The Secretary must evaluate the list no later than 3 years after promulgation of regulations and every 3 years thereafter to determine if additional facilities should be added to the list of chemical sources, as well as to determine if any source already on the list no longer presents a sufficient risk and should be removed.

Subsection 3(g)—Designation, Exemption, and Adjustment of Threshold Quantities of Substances of Concern—Gives the Secretary the authority to designate or exempt chemical substances in certain threshold quantities as substances of concern, as well as adjust those threshold quantities.

Subsection 3(h)—Five-Year Review—Requires the owner or operator, within 5 years of the initial certification and every 5 years thereafter, to review the adequacy of its vulnerability assessment and site security plan. Owners or operators must certify that the review has been done and submit to the Secretary any changes to either the assessment or the plan.

Subsection 3(i)—Protection of Information—Generally exempts materials and information developed or produced exclusively for, contained in, or derived from the development of vulnerability assessments and site security plans from disclosure under the Federal Freedom of Information Act, as well as State and local open records laws. This does not, however, affect the treatment of information from chemical sources under any other law.

DISCUSSION

The committee recognizes that information regarding the vulnerability of a source to terrorism, and the countermeasures adopted to reduce that vulnerability, is among the most sensitive that any private facility can generate. The committee also recognizes the need for the public to know whether a local facility has complied with the law; therefore, the protections do not apply to certifications filed under this Act and to information that is otherwise obtainable under any other law. This subsection also respects the needs of State and local governments to obtain information that they need to coordinate with the Federal Government and facilities, by enabling State and local officials designated by the Secretary to obtain protected information, without concern that they might have to disclose it under their own laws or ordinances.

The committee is also aware of the need for Congress to have access to vulnerability assessment and site security plan information in order to conduct Congress' oversight function.

Subsection 3(i)(1)—Except with respect to certifications specified in subsections (b)(1)(A) and (h)(2)(A), vulnerability assessments and site security plans obtained in accordance with this Act, as well as materials developed or produced in preparation of those documents, are exempt from disclosure under the Freedom of Information Act and any State or local law providing for public access to information.

Subsection 3(i)(2)—Ensures that the handling, treatment or disclosure of information otherwise obtainable under any other law is unaffected by this subsection.

Subsection 3(i)(3)—Requires the Secretary, in consultation with the Director of the Office of Management and Budget and other appropriate law enforcement and intelligence officials, to develop protocols limiting the disclosure of information obtained and provided to the Secretary under this Act. This includes maintaining the information in a secure location and allowing access only to those individuals designated by the Secretary or those entitled to the information.

Subsection 3(i)(4)—Provides for the disclosure of sensitive information sought through discovery or to be introduced into evidence to be provided under seal to a Federal or State civil or administrative court. The court cannot disclose the information to any person until it determines that the disclosure does not post a threat to public security or endanger the life or safety of any person.

Subsection 3(i)(5)—Provides for penalties for a person designated by the Secretary who knowingly or recklessly discloses protected information.

Sec. 4. Enforcement

Subsection 4(a) Failure to Comply—Authorizes the Secretary to order certification and submission of vulnerability assessments or site security plans if an owner or operators fails to do so.

Subsection 4(b) Disapproval—Authorizes the Secretary to disapprove a submitted vulnerability assessment or site security plan that does not comply with regulations or the site security plan is

insufficient to address the vulnerabilities found by the assessment or a threat of a terrorist release not identified in the assessment.

Subsection 4(c) Compliance—Requires the Secretary to provide an owner or operator a clear written notification if a vulnerability assessment or site security plan is disapproved, including specific deficiencies. The Secretary must then consult with the owner or operator to identify steps to achieve compliance. If after consultation, compliance is still not achieved, the Secretary may issue an order to compel correction of specified deficiencies.

Subsection 4(d) Emergency Powers—Authorizes the Secretary to bring a civil action or issue an administrative order to compel action in the case of an "emergency threat."

Subsection 4(d)(1)—Defines an "emergency threat" as one that could result in the likelihood of an immediate terrorist release or release that is beyond the scope of the site security plan or would not be appropriately addressed in a timely manner.

Subsection 4(d)(2)—Allows the Secretary to bring a civil action to compel covered sources to take actions to respond to the identified emergency threat. Secretary must give notice to the covered source and an opportunity to participate in any proceedings relating to the civil action.

Subsection 4(d)(3)—Allows the Secretary to issue orders to handle an emergency threat if it is not practicable that a civil action will adequately address it and such action is necessary to ensure public safety. The Secretary must consult with State and local law enforcement officials and verify information on which the need for action is based. The order will remain effective for 60 days with an option, by civil action, to extend it by 14 days or such longer period as the court authorizes.

Subsection 4(e)—Exempts orders or disapprovals from disclosure under Federal, State and local public open information laws, except if in a Federal or State civil or administrative proceeding.

Sec. 5. Interagency Technical Support and Cooperation

Section 5 provides the Secretary the ability to request and provide reimbursement for technical and analytical assistance from other Federal agencies.

Sec. 6. Recordkeeping; Site Inspections; Production of Information

Section 6 requires a chemical source to keep current copies of its assessment and security plan onsite. The section also establishes authority for the Secretary, in carrying out the Act, to enter or request information from a chemical source and issue an administrative order requiring compliance with these requirements.

Sec. 7. Penalties

Subsection 7(a)—Subjects an owner or operator that does not comply with an order under this Act, or with its plan, to injunctive relief and civil penalties.

Subsection 7(b)—Authorizes administrative penalties and prescribes procedures to be followed, including notice and an opportunity to request a hearing.

Subsection 7(c)—Provides that, in proceedings under this section, protected information shall be treated as if it were classified.

DISCUSSION

It is the committee's understanding that nothing in this Act affects the handling, treatment, or disclosure of information obtained from chemical sources under any other law. It is not the committee's intent to make the determination whether any material collected solely under this Act should or should not be classified. However, the committee recognizes that the Executive Branch may, in the interest of national security, require a specific degree of protection against unauthorized disclosure of sensitive information. It is also the intention of the committee to continue to work in a bipartisan manner to ensure that information gathered pursuant to S.994 is properly protected.

Sec. 8. Provision of Training

Section 8 authorizes the Secretary to provide training to State and local officials and owners and operators.

Sec. 9. Judicial Review

Section 9 provides rules governing judicial review of regulations and other final agency department orders or other action issued by the Secretary under this Act.

Sec. 10. No Effect on Requirements Under Other Law

Subsection 10(a)—Provides that this Act does not affect any duties or requirements under other Federal or State laws, except those relating to protection of information.

Subsection 10(b)—Provides for an alternative to section 3(c) for a chemical source required to prepare a vulnerability assessment and security plan under another Federal law. Under this alternative, the source may petition the Secretary to be subject in all respects to the other law in lieu of this Act. The Secretary may grant such a petition if the Secretary finds that the other Federal law is substantially equivalent to this Act.

Sec. 11. Agricultural Business Security Grant Program

Section 11 establishes and authorizes appropriations for a grant program to assist small agricultural retail or production businesses in improving security. The Secretary, in consultation with the Small Business Administration and the Agriculture Department, would define small businesses on a location-by-location basis.

LEGISLATIVE HISTORY

S. 994, the Chemical Facilities Security Act of 2003, was introduced on May 5, 2003 by Senators Inhofe and Miller and it was referred to the Committee on Environment and Public Works. The full Committee on Environment and Public Works met on October 23, 2003 to consider S. 994, and ordered it favorably reported to the Senate with an amendment in the nature of a substitute.

ROLLCALL VOTES

No rollcall votes were held on S. 994. At its business meeting held on October 23, 2003, the committee agreed, by voice vote, to an amendment in the nature of a substitute offered by Senator

Inhofe. Amendments by Senators Carper, Jeffords, and Clinton were offered, but defeated on voice votes. The Committee on Environment and Public Works ordered S. 994 to be reported to the Senate, as amended, by voice vote.

REGULATORY IMPACT STATEMENT

In compliance with section 11(b) of rule XXVI of the Standing Rules of the Senate, the committee makes evaluation of the regulatory impact of the reported bill. The bill does not create any additional regulatory burdens, nor will it cause any adverse impact on the personal privacy of individuals.

MANDATES ASSESSMENT

In compliance with the Unfunded Mandates Reform Act of 1995 (Public Law 104–4), the committee finds that S. 994 would not impose any Federal intergovernmental unfunded mandates on State, local, or tribal governments. The bill includes regulatory requirements for covered chemical sources.

COST OF LEGISLATION

Section 403 of the Congressional Budget and Impoundment Control Act requires that a statement of the cost of the reported bill, prepared by the Congressional Budget Office, be included in the report. That statement follows.

In response to the following cost estimate, the committee recognizes the difficulties that the Congressional Budget Office and the Department of Homeland Security experienced in preparing cost estimates for programs in a newly created Agency. However, the committee believes that the cost estimate prepared for S. 994 by the Congressional Budget Office may be too high. For example, DHS estimated that it would require $20 million to construct facilities to store the information required under this bill. While the bill does require that information provided to DHS be stored in a secure location, it is likely that DHS will need to construct secure storage facilities in absence of this legislation. Therefore, the committee does not believe it is reasonable to attribute the entire $20 million in potential construction costs to S. 994, given that the maximum potential universe of documents resulting from S. 994 is approximately 15,000. Also, it is unclear at what level the authorized agricultural security grant program will be funded. The committee does not expect this cost to be as high as $90 million since no such authorizing cap was put into S. 994.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 10, 2004.

Hon. JAMES M. INHOFE, *Chairman,*
Committee on Environment and Public Works,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 994, the Chemical Facilities Security Act of 2003.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Susanne S. Mehlman (for Federal costs), who can be reached at 226–2860, Melissa Merrell (for the state and local impact), who can be reached at 225–3220, and Selena Caldera (for the private sector impact), who can be reached at 226–2940.

Sincerely,

DOUGLAS HOLTZ-EAKIN

S. 994, Chemical Facilities Security Act of 2003, as ordered reported by the Senate Committee on Environment and Public Works on October 23, 2003

Summary

S. 994 would require the Department of Homeland Security (DAIS) to develop regulations designed to increase security at facilities vulnerable to unauthorized releases of hazardous chemicals. The regulations would require owners and operators of those facilities to perform vulnerability assessments and to establish site security plans. DHS also would be responsible for reviewing such assessments and security plans and ensuring that they are in compliance with the regulations it establishes. In addition, DHS would be responsible for maintaining the site information it receives in a secure location. Finally, S. 994 would establish a grant program to improve the security of facilities at agricultural retail and production businesses that handle hazardous chemicals.

CBO estimates that implementing S. 994 would cost $216 million over the next 5 years, assuming appropriation of the necessary amounts. Of this amount, we estimate that $126 million would be used by DHS to develop the required regulations, maintain chemical facilities site information, and enforce the bill's new requirements; and that $90 million would be used by DHS to provide grants to improve security at agricultural businesses that produce or sell hazardous chemicals (such as fertilizer). Enacting S. 994 could affect direct spending and receipts because the bill would provide for civil and criminal penalties against owners and operators of chemical facilities who fail to comply with the bill's requirements. However, CBO estimates that any collections for such civil and criminal penalties would not be significant.

Section 4 of the Unfunded Mandates Reform Act (UMRA) excludes from the application of that act any legislative provisions that are necessary for national security. CBO has determined that section 4(d) of the Chemical Security Act, which provides emergency authority to the Secretary of Homeland Security based on threat of a terrorist attack on a chemical storage facility, falls under that exclusion and has not reviewed it for intergovernmental or private-sector mandates.

The remaining sections of S. 994 contain intergovernmental and private-sector mandates by requiring the owners and operators of certain facilities to undertake measures to protect against the unauthorized release of chemical substances. Because several of the

mandates are dependent upon future actions of the Department of Homeland Security for which information currently is not available, CEO cannot determine whether the costs of those mandates will exceed the annual thresholds established in UMRA ($60 million for intergovernmental mandates and $120 million for private-sector mandates in 2004, adjusted annually for inflation).

Estimated Cost to the Federal Government

The estimated budgetary impact of S. 994 is shown in the following table. For this estimate, CBO assumes that the necessary amounts will be appropriated for each year and that outlays will follow historical spending patterns for similar activities. The costs of this legislation fall within budget function 450 (community and regional development) and 750 (administration of justice).

Basis of Estimate

For this estimate, CBO assumes that S. 994 will be enacted near the beginning of fiscal year 2005, and that amounts necessary to implement the bill will be provided for each year.

According to DHS, 4,000 chemical plants and storage sites handle hazardous chemicals that could be vulnerable to unauthorized releases of hazardous materials from terrorist attacks, and such sites would be covered under the bill's provisions, DHS has ongoing efforts to improve the safety and security of those chemical facilities. In 2004, about $39 million was allocated for such activities, including developing guidelines for vulnerability assessments, conducting risk analyses at various sites, and providing training for preparing protection plans at high risk-sites.

By Fiscal Year, in Millions of Dollars

	2004	2005	2006	2007	2008	2009
SPENDING SUBJECT TO APPROPRIATION						
DHS Spending on Security at Chemical Sites Under Current Law:						
Budget Authority[1]	39	0	0	0	0	0
Estimated Outlays	25	11	3	0	0	0
Proposed Changes						
Regulation Development, Review of Vulnerability Assessments and Site Security Plans:						
Estimated Authorization Level	0	20	20	20	20	20
Estimated Outlays	0	18	20	20	20	20
Maintenance of Site Information:						
Estimated Authorization Level	0	20	2	2	2	2
Estimated Outlays	0	13	8	3	2	2
Grants to Agricultural Businesses:						
Estimated Authorization Level	0	20	20	20	20	20
Estimated Outlays	0	10	20	20	20	20
Total Proposed Changes:						
Authorization Level	0	60	42	42	42	42
Estimated Outlays	0	41	48	43	42	42
DHS Spending on Security at Chemical Sites Under S. 994						
Estimated Authorization Level[1]	39	60	42	42	42	42
Estimated Outlays	25	52	45	43	42	42

[1]The 2004 level is the amount appropriated for DHS to address security issue; at chemical facilities in that year.

CBO expects that S. 994 would require DHS to more formally establish protocols for improving security and safety measures at chemical facilities by requiring the department to develop security regulations for chemical plants, review vulnerability assessments and site security plans prepared by plant operators, and maintain such information in a secure environment. CBO estimates that implementing those provisions would cost $126 million over the 2005–2009 period, assuming the appropriation of the necessary amounts. Such spending would fund additional personnel, travel expenses, contract support services, and construction costs for a secure building to house site information. In addition, the bill would authorize whatever amounts are necessary for grants to certain agricultural businesses to improve the security of hazardous chemicals produced or marketed by such businesses.

Based on information from DHS, CBO estimates that, over the next 5 years, efforts to support the development of regulations and review of vulnerability assessments and site security plans (which includes site visits) would require about 150 staff-years at a cost of about $20 million each year. In addition, CBO estimates that DHS would require about $20 million in 2005 to construct facilities to store the site information received in a secure environment and to provide funding for information technology and support services for tracking such information. In subsequent years, CBO estimates that DHS would require about $2 million to provide ongoing support to maintaining the site information.

Because those prosecuted and convicted for violation of the provisions of S. 994 could be subject to criminal fines, the Federal Government might collect additional fines if the legislation is enacted. Collections of such fines are recorded in the budget as governmental receipts (revenues), which are deposited in the Crime Victims Fund and later spent. Civil penalties for violations could also be imposed under the bill, and such collections are recorded in the budget as governmental receipts. In recent years, the Environmental Protection Agency has imposed fines on firms handling hazardous chemicals for violations of the Clear Air Act totaling up to $1 million or $2 million a year. Consequently, CBO expects that the amount of additional fines collected under this bill would be insignificant.

While most of the provisions in this bill would affect DHS's overall role in addressing security matters at about 4,000 chemical sites, this legislation also includes a provision that targets specific types of businesses that mostly sell chemicals to the agricultural sector. Section 11 of S. 994 would establish and authorize appropriations for a grant program to assist such small businesses in making security improvements.

According to the Agricultural Retailers Association, there are about 6,000 retail suppliers of agricultural chemicals and fertilizers who would be eligible to receive grants under the bill. In addition, this association expects that many of those business could use tens of thousands of dollars to improve security and to protect against potential terrorist attacks. Assuming that DHS would attempt to provide grants to as many businesses as possible, CBO estimates that individual grants could range from $10,000 to $50,000, depending on the size of the business. For this estimate, CBO as-

sumes that $100 million would be appropriated over the next 5 years for the majority of eligible businesses to receive assistance.

Intergovernmental and Private-Sector Impact

Section 4 of the Unfunded Mandates Reform Act excludes from the application of that act any legislative provisions that are necessary for national security. CBO has determined that section 4(d) of the Chemical Security Act, which provides emergency authority to the Secretary of Homeland Security based on threat of a terrorist attack on a chemical storage facility, falls under that exclusion and has not reviewed it for intergovernmental or private-sector mandates.

The remaining sections of the bill contain intergovernmental and private-sector mandates as defined in UMRA because it would require owners and operators of certain chemical facilities to undertake specific measures to protect against terrorist attacks, criminal acts, or other categories of chemical releases, based on regulations to be developed by DHS. Because the facilities would be selected from about 4,000 public and private entities (including public water utilities and firms in the chemical industry), the bill could impose both intergovernmental and private-sector mandates as defined in UMRA. It also would preempt State and local authority, an intergovernmental mandate, by exempting those plans and documents from State and local laws that provide public access to information.

Specifically, S. 994 would require that owners and operators of affected facilities conduct an assessment of the vulnerability of their facility, identify the hazards that may result from a substance's release and develop and implement a site security plan to prevent those releases. CBO has been unable to determine whether, and to what extent, DHS would grant owners and operators flexibility in developing and implementing the plans and in choosing to upgrade security, to redesign the manufacturing, refinement, or treatment processes that occur at the facility, or to substitute the materials used in their chemical processes. S. 994 would further require that owners and operators certify completion of both the assessment and plan, submit copies to DHS, maintain records at the facility, and complete a periodic review of the assessment and plan.

According to government and industry representatives, a substantial number of the facilities potentially affected by the bill's provisions are actively engaged in activities similar to those that would be required under S. 994. Such facilities are acting either in response to the terrorist attacks of September 11, 2001, as a condition of membership with chemical industry associations or to comply with the Public Health Security and Bioterrorism Preparedness and Response Act of 2002. If DHS determines that the efforts of such facilities would satisfy the requirements of the bill, CBO expects that those mandates would impose little additional costs on those facilities. However, if DHS uses its authority under the bill to require that owners and operators incorporate the more costly measures of process redesign or material substitution to mitigate the threat of a chemical release, those mandates would impose significant costs on facility owners. Because we have no basis for predicting what regulations DHS would issue, CBO cannot determine

whether the costs of those mandates would exceed the thresholds established in UMRA ($60 million for intergovernmental mandates and $120 million for private-sector mandates in 2004, adjusted annually for inflation).

Estimate Prepared By: Federal Costs: Susanne S. Mehlman (226–2860); Impact on State, Local, and Tribal Governments: Melissa Merrell (225–3220); Impact on the Private Sector: Selena Caldera (226–2940).

Estimate Approved By: Peter H. Fontaine. Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW

Section 12 of rule XXVI of the Standing Rules of the Senate, provides that reports to the Senate should show changes in existing law made by the bill as reported. Passage of this bill will make no changes to existing law.

ADDITIONAL VIEWS OF SENATORS JEFFORDS, BOXER, CLINTON, CARPER AND LIEBERMAN

We look forward to continuing to work with Senator Inhofe in a tri-partisan fashion to craft legislation that would effectively reduce the potential threat of, and consequences from, a terrorist attack at a chemical facility. Security experts have identified chemical facilities as particularly attractive terrorist targets. The Department of Homeland Security (DHS) estimates that there are over 4,000 chemical sites in the United States that, if attacked, could affect populations of 1,000 or more. The chemical industry has submitted data to the U.S. Environmental Protection Agency using a different methodology indicating that a "worst case" release of toxic chemicals could threaten more than one million people at each of 123 facilities spread across 24 States.

We appreciate that Senator Inhofe included some of our suggestions in the revised version of S. 994 at markup. However, in our view, the bill needs further improvement to ensure sufficient accountability, guard against undue industry self-regulation and correct various implementation concerns. The heart of the bill is the requirement that chemical facilities conduct vulnerability assessments and implement security plans. DHS's evaluation and approval of these documents is necessary to help identify those facilities with unique vulnerabilities that need compliance assistance and to enable DHS to recognize best practices that it can share with the rest of the industry. Communities near chemical facilities should also be able to obtain some reassurance from DHS that the facility in their neighborhood has taken appropriate measures to protect their home town.

From our perspective, one of the most important provisions of this bill is the requirement that facilities consider "alternative approaches" when developing their security plans. For example, in the weeks following the September 11 attacks, Washington, DC's sewage treatment plant was able to stop using chlorine and switch to safer chemicals instead. Similarly, many petroleum refineries have switched from hydrofluoric acid to the much safer sulfuric acid. By reducing inherent hazards, such changes provide a more certain means of protecting communities from a potential catastrophic chemical release than physical security alone. We believe it is important that the Federal Government ensure that facilities consider, and use, inherently safer technologies when practicable. The use of safer, alternative approaches is the key to preventing and mitigating adverse effects from terrorist attacks.

The provisions providing for endorsement of existing industry security programs need to be clarified. The bill allows any person to petition DHS to endorse certain procedures, protocols, or standards, and empowers DHS to endorse such standards. The effect of the endorsement, which is only limited by the undefined requirement that the procedures, protocols or standards in question be "substantially equivalent" to the requirements of the Act, is that facilities could opt to meet endorsed standards instead of DHS regulations.

While we were glad that language strengthening this provision was added in committee, several concerns remain. First, the petition process appears to be informal, and thus not subject to the

public participation and judicial review that would accompany a standard rulemaking process. This could undermine the effectiveness of the law.

In addition, the term "substantially equivalent" is undefined in the Act. Because this is the only standard that industry procedures, protocols and standards would need to meet to win DHS endorsement, it is critical that its meaning be clear. In making determinations of "substantial equivalence," DHS should ensure that the industry standard includes all major aspects of the Federal program, including the requirement to consider as defined by the Act and, where practical, implement alternative approaches.

The committee has not substantively reviewed any of the existing industry standards, including the American Chemistry Council's Responsible Care program or the agricultural retailer's Security Vulnerability Assessment program that are mentioned in the report, and offers no opinion on whether these programs should be considered "substantially equivalent." However, it appears that neither program includes a requirement to consider alternative approaches in the same manner as required under the Act.

We also are concerned that S. 994 would exempt Federal facilities from its requirements. As such, Federal facilities would not have to take steps to prevent against terrorist attacks or their effects, only nonFederal facilities would be required to take such steps. The language of the bill exempts these facilities based on who owns them, not on the type of facility. Yet a Federal facility can be many things, a wastewater treatment facility, a power plant or a pesticide storage facility for a national park. The facility faces the same challenges whether it is privately owned or a Federal facility. Further, Federal facilities already fall under many of our environmental, public health and security laws, such as the Clean Air Act, Superfund, the National Environmental Policy Act, the Federal Facilities Compliance Act, and more. There is no reason to exclude them from our chemical security or anti-terror efforts. As we work to ensure a secure homeland, we cannot ignore the important role of Federal facilities.

As written, S. 994 contains a loophole that could result in any information in a judicial proceeding being label as "classified." Because of the breadth of the bill's language, this provision could prohibit the disclosure of any information obtained under or pursuant to this Act, even if it had been obtained for other, lawful purposes, such as toxic release and air emissions data. Furthermore, the bill's language could result in the owner/operator's self-certification that he has complied with the program, which is derived from information submitted under this Act, as being treated as "classified." This broadly written standard is also inconsistent with other provisions of the bill, which explicitly allow the dissemination of information gathered pursuant to any other law or regulation, even if it is included within a chemical security plan or assessment. It is our view that it would be inappropriate to categorize information obtained hereunder as "classified" merely because a judicial proceeding ensues.

We are also concerned about a number of additional issues. For example, the enforcement provisions of S. 994 need to be improved to provide the same criminal sanctions for private sector chemical

workers that knowingly disclose sensitive information as for Federal workers who commit the same offense. Criminal penalties for non-compliance are standard features of many laws under the jurisdiction of this committee, and should also apply to those who refuse to take the necessary steps to reduce the threat of a successful terrorist attack. DHS also should be required to leverage its resources by consulting with other agencies with relevant technical expertise. In this context, the prohibition on such agencies performing field work should be eliminated. Finally, we urge DHS to consider a full range of security risks in developing regulations for security plans, including armed intruders, and to require professional, trained guards and regular testing of security systems.

We look forward to working with Senator Inhofe to resolve these concerns to move forward expeditiously with legislation that will enhance the security of America's chemical infrastructure.